Supreme Court, U. S.
FILED
JAN 20 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court

of the

United States

Fall Term, 1977

No. 77-285

THE STATE OF CALIFORNIA, et al.
Petitioners,

vs.

THE UNITED STATES of AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FRIANT WATER USERS ASSOCIATION, CENTRAL VALLEY EAST SIDE PROJECT ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, COUNTY OF TULARE, AND WESTLANDS WATER DISTRICT AS AMICI CURIAE

BERRYHILL, KUNEY & BURCKHARDT
KENNETH A. KUNEY
P.O. Box 659
Tulare, CA 93274
(209) 686-8311

McCORMICK, MOOCK & McCORMICK
ROBERT E. MOOCK
122 West Willow
Visalia, CA 93277
(209) 734-6729

JOHN P. FRASER
1127 11th Street, Suite 305
Sacramento, CA 95814
(916) 441-4545

RALPH M. BRODY
3454 West Alluvial
Fresno, CA 93704
(209) 439-6259

TOBIN, FRENCH & DILLON
T.V.A. DILLON
International Square
1850 "K" Street N.W.
Washington, D.C. 20006
(202) 466-5533

JAMES GANULIN
P.O. Box 5222
Fresno, CA 93755
(209) 224-1523

Attorneys for the Friant Water Users Association, Central Valley East Side Project Association, Association of California Water Agencies, County of Tulare, and Westlands Water District

CAL CENTRAL PRESS — SACRAMENTO, CALIFORNIA

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INTRODUCTION

This Amici Curiae Brief is submitted on behalf of the Friant Water Users Association, Central Valley East Side Project Association, Association of California Water Agencies, County of Tulare, and Westlands Water District, in support of the Respondent United States of America.

Friant Water Users Association is an unincorporated Association, the members of which are 22 public districts situated in the San Joaquin Valley in the counties of Madera, Fresno, Tulare, and Kern. Each of the member districts is a political subdivision of the State of California, empowered by law to acquire water within the State for sale and distribution to the landowners within its boundaries, and has executed a contract with the United States Department of the Interior, Bureau of Reclamation, to purchase water from the Friant Division of the Central Valley Project. The member districts comprise a total of 1,380,254 acres within the San Joaquin Valley, and their contracts with the United States Department of the Interior, Bureau of Reclamation, are for the purchase of water totaling 2,202,800 acre feet annually. The water delivered to the member districts under these contracts is essential to meet the water needs of their respective areas, and to sustain the agricultural economy of the area within their boundaries.

Central Valley East Side Project Association is a corporation organized and existing under the laws of the State of California. The members of the Central Valley East Side Project Association are individuals, private corporations and associations, county governments, municipal governments, public districts, and other political subdivisions of the State of California situated in the San Joaquin Valley in the counties of Sacramento, San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings, and Kern. The association was formed and exists for the purpose of representing and expressing the common interest of its members in furthering the authorization and construction of the proposed East Side Division and the proposed Mid Valley Canal of the federal Central Valley Project. Each member is either a private individual or entity having an interest in, or governmental agency having responsibility for, the water needs of an area of the San Joaquin Valley that is within the service area of the proposed East Side Division and Mid Valley Canal, and that is in need of, and would be benefited by, the opportunity to purchase a supplemental water supply from the federal Central Valley Project.

The Association of California Water Agencies (formerly the Irrigation Districts Association), is a nonprofit California corporation whose members comprise most of the local public agencies in the State engaged in developing and purveying water for agricultural, domestic, and municipal uses. The members of the Association include 258 public water agencies serving irrigation water to approximately 7,000,000 acres of land, and providing water service to nearly 80 percent of the State's population. Of these members, 44 members have contracts with the United States Department of the Interior, Bureau of Reclamation, for water service from the federal Central Valley Project, and serve that water to a total of 3,062,191 acres within

the great central valley of California.

The County of Tulare is a political subdivision of the State of California. Within the County there are many public districts having contracts with the United States Department of the Interior, Bureau of Reclamation for water service from the Friant Division of the federal Central Valley Project, and many more public districts and cities that have applied to the Bureau of Reclamation for water service from the proposed Mid Valley Canal facilities of the Central Valley Project. Within the County of Tulare there is a present and existing overdraft of the groundwater reservoirs which will lead to serious and drastic shortages of water necessary to supply the present and future demands for water within the County for domestic, industrial and irrigation uses.

Westlands Water District is a political subdivision of the State of California, situated in western Fresno and Kings Counties, encompassing an area of approximately 600,000 acres. The District is empowered by law to acquire water within the State for sale and distribution to landowners within its boundaries, and pursuant to this authority has executed a permanent contract with the United States Department of the Interior, Bureau of Reclamation, to purchase water from the San Luis unit of the federal Central Valley Project in the amount of 1,008,000 acre feet annually. The water to be delivered to the District under this contract is essential to meet the water needs of the service area, and to sustain the agricultural economy of the area within the boundaries of the District.

STATEMENT OF THE CASE AND THE INTEREST OF AMICI CURIAE

The Petitioner State Water Resources Control Board of the State of California is a public agency of the State of California, duly created by the legislature pursuant to the provisions of Article III, Chapter 2, Division 1 (Section 174 et seq.) of the California Water Code. The Petitioner Board is the successor to the duties and liabilities of the State Water Rights Board (California Water Code Section 179).

The California Department of Water Resources, as operator of the California State Water Resources Development System, and the United States Bureau of Reclamation, as operator of the federal Central Valley Project, filed 39 applications with the State Water Rights Board to divert from the water supply of the Sacramento-San Joaquin Delta, pursuant to Divisions 2 and 6 of the California Water Code. Decision D-893, dated March 18, 1958, D-990, dated February 9, 1961, D-1020, dated June 30, 1961, and D-1250, dated June 1, 1966, of the State Water Rights Board, and Decisions D-1308, dated July 18, 1968, and D-1356, dated February 5, 1970, of the Petitioner Board, granted water permits pursuant to these applications to the United States Bureau of Reclamation, with certain limited reservations of jurisdiction. The permits granted to the United States Bureau of Reclamation represent water rights established under Division 2 of the California Water Code essential to the ability of the Bureau of Reclamation to fulfill its contractual commitment to deliver water to the public water agencies with whom it has existing contracts, and essential

to the ability of the Bureau of Reclamation to fulfill its intention to deliver water to prospective contractors who have applied to it for a water supply through the facilities of the proposed East Side Division and the proposed Mid Valley Canal of the federal Central Valley Project.

Pursuant to the reservation of jurisdiction referred to above, and Article III, Division 1, Chapter 2 of the California Water Code, the Petitioner Board reopened public hearings to determine what modifications, if any, should be made to existing state and federal water permits. Hearings in the matter of Application 5626 and 38 other applications to appropriate from the Sacramento-San Joaquin Delta water supply commenced on July 22, 1969, and continued for 94 actual hearing days. The Central Valley East Side Project Association, Friant Water Users Association, Westlands Water District, and County of Tulare appeared in these proceedings and presented testimony and exhibits in support of the United States water permits.

On July 28, 1971, the Petitioner Board issued Decision 1379. Decision 1379, as modified by the Petitioner Board's Order of September 16, 1971, purported to impose new permit terms and conditions upon the existing United States water permits that would:

1. Require the Bureau of Reclamation to maintain, either by a discontinuation of direct diversion at the project pumps or by release of natural flow or water in storage, water quality in the channels of the Delta, equal to or better than those enumerated in the State Delta Standards. ("State Delta Standards" are then set forth in the Decision, constituting specifications of

water quality and water quantity at designated geographical stations for each period of each year for the protection of agricultural uses, industrial and municipal uses and fish and wildlife.)

2. Require the Bureau of Reclamation to make such releases of project water without any provision for compensation.

3. Require the Bureau of Reclamation to install and operate water quality monitoring stations in the Delta and make certain studies of conditions in the Delta as prescribed by the Petitioner Board.

4. Require the United States Bureau of Reclamation to operate the federal Central Valley Project in full coordination with the State Water Project.

5. Require the United States Bureau of Reclamation to restrict its diversions or to release water from storage to maintain standards of water quality within the Delta for the protection of fish and wildlife.

6. Reserve jurisdication to the Petitioner Board over the United States water permits for an additional indeterminate period of time for the purpose of modifying the permit terms and conditions imposed by the Decision, or imposing new and additional permit terms and conditions.

After all petitions for reconsideration, objections to, and clarification of, Decision 1379 were denied by the Petitioner Board, the Friant Water Users Association, Central Valley East Side Project Association, County of Tulare, Westlands Water District, and others filed a Petition for Writ of Mandate in the Superior Court of the State of California for the County of Sacramento, seeking judicial review of the Petitioner Board's Deci-

sion 1379 under the appropriate provisions of California Law. The Petition for Writ of Mandate alleges and contends that in purporting to impose these terms and conditions on the United States water permits, the Petitioner Board had:

1. Proceeded without jurisdiction and in excess of jurisdiction.

2. Ignored and disregarded the legislation by the Congress of the United States in authorizing the federal Central Valley Project.

3. Failed to comply with applicable state and federal law.

4. Not proceeded in the manner required by law.

5. Ignored and disregarded the provisions of Article XIV, Section 3, of the Constitution of the State of California, and Sections 106, 1254 and 10,500 of the California Water Code. The United States Department of the Interior, Bureau of Reclamation, was named as Real Party in Interest in the Petition.

A Petition for Writ of Mandate seeking judicial review of the Petitioner Board's Decision 1379, was also filed in the same court by several water agencies having contracts for water service from the California State Water Project. The Contra Costa County Water Agency, which had been allowed to intervene in the cases, filed a Cross-Complaint against the United States Bureau of Reclamation and the California Department of Water Resources, and the two cases were thereupon transferred to the United States District Court for the Eastern District of California and docketed as *Central Valley East Side Project Association* vs. *the State Water Resources Control Board* (Civ. S-2582)

and *Kern County Water Agency* vs. *State Water Resources Control Board* (Civ. S-2583).

In 1972 the Petitioner Board rendered its Decision 1400 imposing numerous terms and conditions on the water permits previously issued to the United States for diversion of water from the American River for use in the federal Central Valley Project. A Petition for Writ of Mandate to obtain a judicial review of that Decision was filed by the San Joaquin County Flood Control and Water Conservation District in the Superior Court of the State of California for the County of Placer. The Petition in that action challenged Decision 1400 on jurisdictional grounds that were substantially the same as those urged by the Amici Curiae in their challenge to Decision 1379. The Friant Water Users Association and Central Valley East Side Project Association were allowed to intervene in that action in support of the petitioners. That action was also removed to the United States District Court for the Eastern District of California and docketed as *San Joaquin County Flood Control and Water Conservation District* vs. *the State Water Resources Control Board* (Civ. S-2730).

After the filing of the instant case, *United States of America* vs. *The State of California* (S-3014), in the same court, that court, by order dated July 8, 1974, stayed all action, except for discovery, in proceedings Civ. S-2582, Civ. S-2583, and Civ. S-2730 pending a decision in the instant case. The petitioners in the stayed actions, including these Amici Curiae, were granted Amicus Curiae status in *United States of America* vs. *The State of California* (Civ. S-3014), and

as such they participated at all stages of the proceedings in the District Court.

Final resolution of the central federal-state jurisdictional issue in the instant case regarding Decision 1422 will be determinative of that same issue raised in the challenges to Decisions 1379 and 1400 of the Petitioner Board. Consequently, the final determination of the instant case will have a direct and significant effect on all federal water service contractors in California, as it will determine the integrity of their intended water supply from not only the New Melones project, but from all other features of the federal Central Valley Project as well.

SUMMARY OF ARGUMENT

I

Section 8 of the Reclamation Act of 1902 only requires the United States to recognize state water rights when it is acquiring water to operate a congressionally authorized project, and preempts the application of state law except for the definition of the property rights acquired. The state cannot compel the use of federal property on terms other than those prescribed or authorized by Congress. Section 8 recognizes private water rights established pursuant to state law; it does not give to the state any control over the operation of the federal project nor any power to direct that the project be operated for purposes and objectives other than those expressly authorized by Congress.

II

The Supreme Court of the State of California has

adopted a somewhat more limited view of the preemption, but acknowledges that the Reclamation Act preempts the application of state law (1) when state law conflicts with federal law, and (2) when a danger exists that the application of state law would either interfere with the Secretary's expressly delegated powers, frustrate operation of the project, or limit the benefits of the project.

III

When the United States applies to the Petitioner Board for the water right permit necessary to the project, there is no need for the Board to have the power to impose terms and conditions on that permit in order for the state to be fully informed and involved in the appropriation process. The extensive requirements for the contents of the application itself assures California full information and involvement. If a permit is issued pursuant to the application, it is sharply defined in terms of place of diversion, times of diversion, quantity of diversion, place of use, and purpose of use, all in conformity with the provisions of the application, and the United States must adhere strictly to those provisions.

IV

Whether the Reclamation Act preempts the application of state law except for the definition of the property rights acquired, as we believe, or that preemption is somewhat more limited as in the view of the California Supreme Court, the result is the same in

this case. The permit terms and conditions imposed by the Petitioner Board in Decisions 1379 and 1422 are clear demonstrations that if the State Board is allowed to impose any terms and conditions whatsoever on the permit granted to the United States, there is a real danger of interference with the Secretary's expressly delegated powers to contract for the benefits from the project, frustration of the project operation, and reduction of project benefits.

I

SECTION 8 OF THE RECLAMATION ACT OF 1902 PREEMPTS THE APPLICATION OF STATE LAW EXCEPT FOR THE DEFINITION OF PROPERTY RIGHTS ACQUIRED.

The entities on whose behalf this amicus brief is filed strongly support the position of the United States that Section 8 of the Reclamation Act of 1902 only requires the United States to recognize State law in the acquisition of unappropriated water to operate federally authorized projects. As stated again and again in decisions of this court, the United States is only required by Section 8 to recognize state water rights when it is acquiring water to operate a Congressionally authorized project. It is not reasonable to have Congress authorize a project based on certain feasibility findings and for certain purposes, and then allow a state, at some later point in time, to require that the water be used for some purposes contrary to the purposes authorized and directed by Congress.

This issue was laid to rest years ago. Perhaps not the first time, but at least one of the earliest times this

Court addressed the sole issue was in *Ivanhoe Irrigation District* vs. *McCracken* (1955) 357 U.S. 275; 78 S. Ct. 1174; 2 Law Ed. 2d 1313. The Attorney General of California argues that this case only holds that unless you have a specific inconsistent federal law that the State law prevails. This is not the case. In *Ivanhoe, supra*, and later cases, this theory has no support.

In order to properly understand *Ivanhoe, supra*, it is necessary to read and understand *Ivanhoe Irrigation District* vs. *All Parties*, (1957) 47 Cal. 2d 597, 306 Pac. 2d 824, before the United States Supreme Court decision, and *Ivanhoe Irrigation District* vs. *All Parties*, (1960) 53 Cal. 2d 692; 3 Cal. Rptr. 317; 350 Pac. 2d 69, after the United States Supreme Court decision.

In the first *Ivanhoe* case, 47 Cal. 2d 597, the California Supreme Court construed Section 8 of the Reclamation Act of 1902, so as to require the United States to recognize and comply with State law in operating the Central Valley Project, just as the Attorney General now contends the United States is bound. The acreage limitation was not the only issue and the California Supreme Court decided any number of other issues in which the United States would have to yield to the existing State laws. This is shown most clearly by the conclusions reached by the California Supreme Court at Page 647 of the Opinion, where the Court said:

> "In accordance with the foregoing it is concluded:
> (1) That the plaintiff is an irrigation district duly organized, existing and operating as such under the laws of this state.
> (2) That the title to the unappropriated

domestic waters of the state is in the State of California in trust for the water users of the state as beneficiaries and such waters are subject to appropriation under the laws of the state.

(3) That the United States as assignee of appropriative rights, as original appropriator thereof, and in the acquisition of other rights for the same purpose stands in the same relation to such beneficial owners as does the state, namely, as trustee for such beneficial owners and is answerable for the faithful performance of that trust.

(4) That in distributing the water contracted to be delivered to the District the United States does so as a purveyor of water at a price for the benefit of the water users of the District.

(5) That in so delivering the water to the District, it is not competent for the United States or the District, either or both, to discriminate against the present or potential water users in the District on the basis of the amount of land owned by them, and that the 160-acre limitation contained in the original Reclamation Act is inapplicable to the subject matter of the contract and is improperly contained therein.

(6) That insofar as the contract provides for the construction of works for the storage and distribution of water to and by the district, the relationship of the parties is that of constructor and contractee. Upon the completion of the construction work the district is obligated under the law to pay for the same within 40 years in equal annual installments. Upon the completion of such payments the district is entitled to ownership of the works and property of the storage and distribution system free from any claims of the United States.

(7) That insofar as the contract provides for

furnishing water to the district at a price the United States in acting as a purveyor of domestic waters of the state to the district, under federal law, is bound to observe and comply with the laws of the state with reference to the rights which are vested in the water users being served or entitled to be served. In this respect neither the state nor any of its agencies may contract or otherwise provide that the distribution of water to those for whose benefit the right to the water was acquired may be arbitrarily discontinued.

The judgment is affirmed."

After the United States Supreme Court decided *Ivanhoe*, 357 U.S. 275, the case went back to the California Supreme Court for the decision in 53 Cal. 2d 692. The California Supreme Court of course abandoned any effort to impose state law on the United States. Not on the acreage limitation issue alone, but also on the many other issues involving state law. At Page 704 of the second *Ivanhoe* Opinion by the California Supreme Court, the Court said this:

> "The problem left for determination on the issue of the validity of the contracts is thus now quite simple. The federal government with federal funds has lawfully developed water — project water — that without the project would not have been developed. The United States and the State of California have provided by appropriate legislation for entering into contracts regarding this water, and have provided certain limitations on its use, so that the water thus developed will reach the ultimate user subject to those conditions. This water belongs to or by appropriate action may be secured by the United States. In a very real sense it is or will become the property of the United States.

As was stated by the United States Supreme Court (*Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. at p. 295):

'Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. (Citing cases.) The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to the federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. (Citing cases.) Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislation action' "

At Page 708 of the same Opinion, the California Supreme Court held:

"The holding of this court that section 8 of the Reclamation Act made state law applicable to these contracts, was directly reversed by the United States Supreme Court. The high court stated: 'The opinion of the Supreme Court of California turned on an interpretation of . . . § 8 of the Reclamation Act of 1902. That section provides that the Act is not to be construed as interfering with state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' It further provides that in administering the Act the Secretary of the Interior 'shall proceed in conformity with such laws. . .' The California court held that this provision required the application of California law, and finding the provisions of the contracts contrary thereto, it refused confirmation.' (357 U.S. at 278.) And again: 'In effect, the (California) court held that this section (§ 8) overrides all other sections of the Act, requiring that it be construed

as not affecting state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' Turning to state law, the court by applying a 'trust theory' held that the Federal Government could acquire no title to appropriate water rights free of a trust in the State of California for the benefit of the people of the State. This 'limited measure of control' of the appropriative water, the court said, 47 Cal. 2d, at 620. . . , prevented the imposition of the 160-acre limitation because the beneficiaries of the trust, namely, the people of the State and particularly those in the districts involved, would be deprived by the acreage limitation of a right to the use of the water in the district. We think it plain that this was a construction of federal law and not a holding of unconstitutionality.' (357 U.S. at 289.)

The United States Supreme Court then held that this court's construction of section 8 of the Reclamation Act was erroneous. 'As we read § 8 it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operations of federal projects. As the court said in *Nebraska* v. *Wyoming*, *supra*, (325 U.S. 589 (65 S. Ct. 1332, 89 L. Ed. 1815)) at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.' Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '(n)o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . .' We read nothing in § 8 that compels the United States to

deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary (of Interior) to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century.' (357 U.S. at 291.)"

And at Page 713 of the Opinion, the California Supreme Court said this:

"The following statements of the United States Supreme Court are here pertinent:

'There can be no doubt of the Federal Government's general authority to establish and execute the Central Valley and Santa Barbara County projects. As we said in *United States* v. *Gerlach Live Stock Co.*, *supra* (339 U..S. 725 (70 S. Ct. 955, 94 L. Ed. 1231, 20 A.L. R.2d 633)), at 739, the Congress 'elected to treat it (the Central Valley Project) as a reclamation project.' We upheld its power to pursue the project as 'clear' and 'ample', an exercise of the general power 'to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement.' *Id.*, (339 U.S.) at 738... In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and *national purpose*, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. As this Court said in *United States* v. *San Francisco*, 310 U.S. 16, 19-30 (60 S. Ct. 749, 84 L. Ed. 1050) (1940), this 'power over the public land thus entrusted to Congress is without limitations.' 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" (Citations)" (357 U.S. at 294 (emphasis added).)

With regard to the power of Congress to

regulate the use of federal funds, the court used language worth repeating: 'Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. (Citing cases.) The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. (Citing a case.) *Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.*' (357 U.S. at 295 (emphasis added).)"

If anyone had any doubt as to what *Ivanhoe*, 357 U.S. 265 meant after reading *Ivanhoe*, 53 Cal. 2d 692, Mr. Justice Clark took care of that in *Fresno* vs. *California*, (1963) 372 U.S. 627; 83 S. Ct. 996; 10 L. ed. 2d 28, where he explained again the scope of Section 8 of the Reclamation Law of 1902 at Page 30 of the Decision where he said:

"We agree entirely with the disposition of the Court of Appeals. Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 USC § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin

*(372 US 630)

and to the *priority of domestic over irrigation uses. However, § 8 does

Headnote 2 not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrig. Dist.* v.

McCracken, 357 US 275, 2 L ed 2d 1313, 78 S. Ct. 1174 1958). Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made."

Later in 1963, after the *Fresno* case, supra, the United States Supreme Court again explained *Ivanhoe*, *supra*, in *Arizona* vs. *California*, 1963, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542, where at Page 570, the Court stated:

"The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 US 275, 2 L ed 2d 1313, 78 S.Ct. 1174 (1958), and reaffirmed in *Fresno* v. *California*, 372 US 627, 10 L ed 2d 28, 83 S.Ct. 996 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

Headnote 26

'As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming*, *supra*, at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. '. . .We read nothing in § 8 that compels the

Headnote 27

United States to deliver water on conditions imposed by the State.' Id. 357 US at 291, 292.

*(373 US 587)

*Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act."

It would seem that this Court clearly held in *Arizona* vs. *California*, 373 U.S. 546, *supra*, that Section 8 of the 1902 Act does not give states control over operation of federal reclamation projects. While Section 8 recognizes private water rights established pursuant to state law, the Secretary of the Interior is not bound to any state formula in operating reclamation projects. When in the operation of a federal reclamation project, operation and management choices are to be made, it is the Secretary who makes the decisions.

The Ninth Circuit said much the same in *Turner* vs. *Kings River Conservation District*, 360 F. 2d 184, 197 *et seq*. (1966). *Turner* says that states cannot control federal methods of acquisition or operation of reclamation projects. The Court said further (at 198):

"We must agree with the government that reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1944] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes should a state permit not be forthcoming."

The principle applied in these cases is supported by

two recent decisions of the Court involving other federal statutes. We refer to *Hancock* vs. *Train*, 1976, 426 U.S. 167, interpreting Section 118 of the Clean Air Act, 42 U.S.C. 1857F, and *Environmental Protection Agency* vs. *California ex rel., State Water Resources Control Board*, 1976, 426 U.S. 200, interpreting Section 313 of the Water Pollution control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. 1323. In the *E.P.A.* vs. *California* decision, the Court said:

> "Our decision in this case is governed by the same fundamental principles applied today in *Hancock* vs. *Train*, ante, at 179: Federal installations are subject to state regulation only when and to the extent that Congressional authorization is clear and unambiguous. Id. at 211."

II

AT THE LEAST, THE RECLAMATION ACT PREEMPTS THE APPLICATION OF STATE LAW WHEN STATE LAW CONFLICTS WITH FEDERAL LAW, AND WHEN THERE IS DANGER OF INTERFERENCE WITH EXPRESSLY DELEGATED POWERS, FRUSTRATION OF PROJECT OPERATION, OR LIMITATION OF PROJECT BENEFITS.

If the decisions of this Court interpreting Section 8 do not stand for the proposition that that Section of the Reclamation Act of 1902 preempts the application of state law beyond a definition of the property interest to be acquired, they, at very least, stand for the proposition that the Reclamation Act preempts the application of state law (1) when state law conflicts with Federal Law, and (2) when a danger exists that the application of state law would either interfere with the Secretary's expressly delegated powers, frustrate operation of the project, or limit the benefits of the project. In a case involving a contract between the East Bay Municipal Utility District and the United States for water service from the Auburn-Folsom South Unit of the Federal Central Valley Project, the Supreme Court of the State of California, in a most recent decision, has so interpreted these decisions of the Court. (*Environmental Defense Fund, Inc.*, v. *East Bay Municipal Utility District*, 20 Cal. 3rd 327, filed Dec. 20, 1977). After consideration of this Court's decisions in *Ivanhoe*, *Fresno*, and *Arizona*, the Court states (20 Cal. 3rd 327, 338):

> "The Court held that Congress preempts state laws not only when direct conflict exists, but also when danger exists in that state law either interferes with the Secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project."

As confirming the *Arizona* construction of Section 8, the California Court cites two earlier decisions of this Court dealing with statutes similar to Section 8: First *Iowa Hydro-Elec. Coop.* v. *Federal Pow. Com.* (1945) 328 U.S. 152, dealing with Section 27 (16 U.S.C. 821) of the Federal Power Act (16 U.S.C. 802(b)), and *Rice* v. *Board of Trade* (1946) 331 U.S. 247, dealing with Section 4c of the Commodity Exchange Act (7 U.S.C. 1 et. seq.).

III

THE CALIFORNIA APPLICATION AND PERMIT PROCEDURE ASSURES THE STATE FULL INFORMATION AND INVOLVEMENT.

It is the judgment of the court below that the United States of America can appropriate unappropriated water necessary for use in any federal Reclamation project within the State of California, but must first apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water; that the Board must grant such applications if unappropriated waters are available; and that it is beyond the power of the Board to impose any terms or conditions in permits issued to the United States of America as a result of applications to the Board by the United States for allocation of unappropriated water.

The Petitioner contends that without the power to impose terms and conditions on the permit, the state would not know where the water was to be used or for what purpose. There is no substance to this contention. California has most extensive requirements for the contents of the application itself. Article II, Chapter 2, Part 2, Division 2 of the California Water Code, "Contents of Applications" contains the following provisions:

"Section 1260. REQUIRED CONTENTS

Every application for a permit to appropriate water shall set forth all of the following:

(a) The name and post office address of the applicant.
(b) The source of water supply.
(c) The nature and amount of the proposed use.
(d) The location and description of the proposed headworks, ditch, canal, and other works.
(e) The proposed place of diversion.

(f) The place where it is intended to use the water.
(g) The time within which it is proposed to begin construction.
(h) The time required for completion of the construction.
(i) The time for the complete application of the water to the proposed use.
(j) All data and information reasonably available to applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the appropriation.

Section 1261. MAPS, DRAWINGS, AND OTHER DATA

All applications shall be accompanied by as many copies of such maps, drawings, and other data as may be prescribed or required by the board, and such maps, drawings and other data are part of the application.

Section 1262. AGRICULTURAL PURPOSES

If for agricultural purposes the application shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be.

Section 1263. POWER PURPOSES

If for power purposes the application shall state the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the use to which the power is to be applied.

Section 1264. MUNICIPAL WATER SUPPLY

If for municipal water supply the application

shall state the present population to be served, and, as near as may be, the future requirements of the city.

Section 1265. MINING PURPOSES

If for mining purposes the application shall state the nature and location of the mines to be served and the methods of supplying and utilizing the water.

Section 1266. STORAGE IN RESERVOIR

If for storage in a reservoir the application shall state the height of dam, the capacity of reservoir, and the use to be made of the impounded waters, except that for storage underground these additional requirements as to height of dam and capacity of reservoir shall be given as near as may be."

If the Board finds that there are unappropriated waters available to satisfy the application, the water rights permit issued by the Board is sharply defined in terms of place of diversion, times of diversions, quantity of diversions, place of use, and purpose of use, all in conformity with the provisions of the application. In the exercise of the water right acquired, the United States must adhere strictly to the provisions of the permit. Certainty and full knowledge is thus assured to both California and the United States.

IV

IF THE STATE BOARD IS ALLOWED TO IMPOSE ANY TERMS AND CONDITIONS ON THE PERMIT GRANTED TO THE UNITED STATES, THERE IS REAL DANGER OF INTERFERENCE WITH THE SECRETARY'S EXPRESSLY DELEGATED POWERS, FRUSTRATION OF THE PROJECT OPERATION, AND REDUCTION OF PROJECT BENEFITS.

If the State Board is allowed to impose any terms or conditions beyond the express provisions of the permit, in conformity with the application, there is a very real danger that those terms and conditions will interfere with the Secretary's expressly delegated power to contract for the reimbursable benefits from the project, will frustrate the operation of the project, and will limit and reduce the project benefits available for those uses and purposes for which the project was expressly authorized by Congress.

Petitioners argue that the permit terms and conditions imposed by the Petitioner Board in Decision 1422 did not seek to control the use of water from the New Melones Project, and were not inconsistent with the purposes of that Project. The restrictions imposed by the permit terms and conditions are summarized by the District Court (R.1044-1045) as follows:

> (1) Conditions relating to impoundment — Conditions 1 and 2 defer full impoundment of all waters sought by the Bureau until such time as the Bureau is able to demonstrate a plan or a firm commitment for the use of project water.
>
> (2) Conditions relating to reservation of jurisdiction — Conditions 6, 9, 13, 20, and 22 reserve jurisdiction to the Board to impose further conditions on the Bureau to protect the "beneficial use" of water involved.
>
> (3) Conditions relating to reporting requirements — Conditions 3, 7, 8, 12 and 21 impose requirements of further or continuing study or the filing of specified reports.
>
> (4) Conditions limiting or controlling the use of water — Conditions 4, 5, 14, 19, 23, 24, and 25 place various limits or controls on the use of water to or from the project.

(5) Conditions relating to time — Conditions 10 and 11 impose various time constraints on completion of the project and application of water.

(6) Conditions relating to accessability — Conditions 15 and 16 discuss the access to be afforded to representatives of the Board and members of the public.

(7) Conditions imposing mandatory requirements — Condition 17 imposes the requirement on the Bureau to install an outlet pipe "as near as practicable to the bottom of the natural stream channel"; condition 18 requires the Bureau to clear vegetation and structures from the side of the reservoir in accordance with California Water Code provisions.

We submit that on their face these restrictions would interfere with the Secretary's expressly delegated power to contract for the water from the project, would interfere with the operation of the project as authorized, would limit and reduce the benefits of the project available to those uses and purposes for which it was authorized, and would impose upon the United States the financial burden of performing acts and constructing works not contemplated by the authorizing legislation.

Assuming, arguendo, that the terms and conditions imposed in Decision 1422 were *not* inconsistent with the purposes of that project, and would *not* interfere with its operation, this is entirely beside the point. The important point is not what the Petitioner Board *did* in Decision 1422, but rather what the Board *might do*, or has in other decisions *attempted to do*, if it is once conceded the power to impose terms and conditions on

the permit beyond the strict limiting provisions of the application itself.

A perfect demonstration of the real danger that exists if this power is once conceded to the Board, is what the Petitioner Board purported to do in Decision 1379. This is the decision challenged by these Amici Curiae in *Central Valley East Side Valley Project Association* vs. *The State Water Resources Control Board* (Civ. S-2582), the companion case stayed by the District Court pending a decision in the instant case. In the hearing leading to that decision the Petitioner Board had before it all of the water right permits that the Board and its predecessors in function had previously granted to the United States Bureau of Reclamation in support of the Federal Central Valley Project. The new and additional terms and conditions that Decision 1379 purported to impose on those water right permits are summarized in the portion of this Brief entitled "Statement of the Case and the Interest of Amici Curiae" (6, 7). With no provision for reimbursement to the United States, and no regard for the integrity of the power and water service contracts that the Secretary had previously entered into pursuant to the authorizing legislation and the water right permits that had been granted to the United States, these terms and conditions purported to impose upon the United States the obligation to provide an unlimited quantity of water from the project to maintain specified water quality standards throughout the Sacramento-San Joaquin Delta for the protection *and enhancement* of agricultural uses, industrial and municipal uses, fish and wildlife, and the general en-

vironment. A compliance with such provisions would require the Secretary to divert a significant portion of the project water supply benefits from the reimbursable uses and purposes authorized by Congress, to the unauthorized Delta uses preferred by the Petitioner Board. All without regard for either the financial integrity of the project or the circumstances of the water service contractors that for more than 25 years had relied upon, and paid for, the project water supply. Further, the restrictions purported to directly interfere with the operation of the project by requiring the United States to operate the project in full physical coordination with the California State Water Project, a proposition never considered or authorized by the Congress. Further, there was imposed on the United States the financial burden of installing works and conducting studies in the Delta, not provided for in the authorizing legislation. And finally, as in Decision 1422, the Petitioner Board purported to reserve jurisdiction to itself for an indeterminate period of time for the purpose of modifying their restrictions or imposing additional terms and conditions. How can it be seriously contended by anyone that in enacting Section 8 of the Reclamation Act, the Congress intended or contemplated that a water project authorized and constructed by the United States pursuant to the Act, would be forever subject to the uncertainty of having its purposes and objectives changed, without regard for the financial feasibility of the project, in order to comply with conditions that the Petitioner Board, from time to time, might see fit to impose.

The planning, formulating and authorizing of a federal water project is a very long and complicated process, usually taking several years. There are extended feasibility studies considering the constant alternatives, the water supplies available, the water needs and payment capacity of the intended project beneficiaries, the balance of different purposes and objectives of the project and many other factors. Throughout this study there is both local area and state involvement. When the plan is finalized in a form that can be recommended, it is subject to the test of committee hearings and examined by both the House and Senate. In this latter process, it is virtually impossible to obtain Congressional authorization without the strong recommendation and support of the state involved. The authorization of every feature of the federal Central Valley Project, including the New Melones project, has followed this course and has the strong recommendation and support of the State of California, with the state authority representative, the California Water Commission, appearing and testifying before the Congressional Committee. In finally authorizing the project, the Congress has very specific purposes and objectives in mind. We do not believe that it is reasonable to suppose that in adopting Section 8, Congress intended that at the conclusion of this long and involved authorization process there would remain vested in a state administration board the power to change the project to conform to the board's concept of what geographical area should receive the project water, what purposes and objectives should be served by the project, what the allocation between reimbursable and nonreimbursable benefits should be,

and how the project should be operated. This is the power that the Petitioner Board contends for.

It appears to us that the posture of the State of California in this matter is both inconsistent and self-defeating. The Reclamation Act expressly authorizes and directs the Secretary to acquire the property necessary for the project. California wants the United States to continue its practice of acquiring the necessary water rights through the application and permit procedure so that the state can be informed and involved. And yet California contends for the power to give the United States no more than a temporary water right permit, reserving to itself the right to modify that permit in any manner that it wishes at any time in the future. If California is successful in this contention, and if there are to be any federal water projects in California, then the Secretary will be forced to abandon the practice of acquiring the water rights through the application and permit procedure and resort to acquisition by condemnation and purchase in order to comply with his directive from the Congress to acquire the full and permanent water rights necessary to insure the feasibility of the project.

CONCLUSION

The only reasonable interpretation of Section 8 of the Reclamation Act of 1902 is the interpretation enunciated by this Court in *Ivanhoe*, *Fresno*, and *Arizona*, and by the 9th Circuit in *Turner*. In directing the Secretary to proceed in conformity with state law, the Congress intended that the United States should

be required to recognize state water rights when it is acquiring water to operate a congressionally authorized project, but that the use of that federal project be subject to no terms or conditions other than those prescribed or authorized by Congress. The section does not give to the state any control over the operation of the federal project nor any power to direct that the project be operated for purposes and objectives other than those expressly authorized by Congress. It is clearly demonstrated by the permit terms and conditions of Decisions 1379 and 1422 that by contending that it has the power to impose terms and conditions on the water right permit issued to the United States, the Petitioner Board means that it has the power (1) to require the Secretary to take project water away from a geographical area and purpose of use for which it was expressly authorized and deliver it to another geographical area for an entirely different unauthorized purpose, (2) to require the Secretary to take project water away from benefits that were declared by Congress to be reimbursable and for which the Secretary was directed to execute water service contracts, and use that water for different benefits for which there is no provision for reimbursement to the United States, (3) to require the Secretary to operate the federal project in full physical coordination with the project operated by the California Department of Water Resources, (4) to require the Secretary to install works and conduct studies not authorized by Congress, (5) to grant to the United States no more than a temporary water right permit, reserving to itself the right to modify that permit in any manner that it wishes at any

time in the future. It cannot be contended reasonably that in adopting Section 8 of the Reclamation Act of 1902 the Congress intended to give to the states any such blank check as this to completely restructure a federal water project. Congress certainly did not intend that after all of the deliberations and considerations involved in the legislative process of objectives of that project and the provisions assuring financial integrity would be subject to whatever changes and modifications the Petitioner Board might see fit to direct.

For the foregoing reasons your amici respectfully request that the judgment of the Ninth Circuit be affirmed.

DATED: January 19, 1978

Kenneth A. Kuney
Robert E. Moock
John P. Fraser
Ralph M. Brody
T.V.A. Dillon
James Ganulin
By Kenneth A. Kuney

Attorneys for the Friant Water Users Association, Central Valley East Side Project Association, Association of California Water Agencies, County of Tulare, and Westlands Water District